

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	CC Docket No. 90-571
)	
Telecommunications Relay Services)	CC Docket No. 98-67
And Speech-to-Speech Services for)	
Individuals with Hearing and Speech)	CG Docket No. 03-123
Disabilities)	

To: The Commission

**HAMILTON RELAY, INC. COMMENTS IN RESPONSE
TO FURTHER NOTICE OF PROPOSED
RULEMAKING**

HAMILTON RELAY, INC.

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October 18, 2004

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SUMMARY

Hamilton Relay, Inc. (“Hamilton”) is submitting these comments in response to the Commission’s June 30, 2004 *Further Notice of Proposed Rulemaking*, in which it proposes a number of changes to the ways in which Internet Relay services and Video Relay Services (“VRS”) are regulated. Hamilton’s comments may be summarized as follows:

- Internet Relay services should continue to be funded solely from the Interstate telecommunications relay services (“TRS”) Fund;
- Hamilton is generally supportive of making Internet Relay a mandatory service, but Hamilton does not support adoption of the cost allocation proxy method (or any other proxy method);
- The costs associated with providing traditional TRS and Internet Relay services are substantially the same, and therefore the Internet Relay compensation rate should continue to be tied to the traditional TRS rate;
- The VRS rate should be competitively-based;
- Federal certification of Internet Relay and VRS providers would serve the public interest;
- The TRS Advisory Council is a valuable resource and its nomination procedures are sufficient; and finally
- Hamilton has developed internal procedures to address the issue of Communications Assistant (“CA”) abuse.

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Hamilton Relay, Inc. (“Hamilton”) hereby submits its comments in response to the Commission’s *Further Notice of Proposed Rulemaking* issued on June 30, 2004 (“*FNPRM*”).¹ The *FNPRM* proposes a number of changes to the ways in which Internet Relay services and Video Relay Services (“VRS”) are regulated. Hamilton welcomes the opportunity to submit these comments.

I. Internet Relay Issues.

A. Internet Relay Providers Should Continue to Be Compensated Solely from the Interstate TRS Fund.

The Commission has sought comment on whether Internet Relay providers should be compensated solely from the interstate TRS fund, as they are now, or whether there is a mechanism to separate Internet Relay calls along jurisdictional

¹ *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Docket No. 90-571, CC Docket No. 98-67, CG Docket No. 03-123, FCC 04-137, ¶¶ 220-258 (“*FNPRM*”).

lines, such that interstate Internet Relay calls are compensated out of the Interstate TRS fund, while intrastate Internet Relay calls are compensated out of the various intrastate TRS funds.

Hamilton believes that no such mechanism exists. One of the benefits of Internet Relay is that it allows relay customers to connect anywhere and at any time to any Internet Relay provider. This benefit comes with a burden, in that Internet Relay providers are unable to determine with any certainty the exact location of the Internet Relay user, and thus are unable to determine whether the Internet Relay call is interstate or intrastate in nature. Two years ago, NECA noted that “Internet addresses do not have geographic correlates. There is no Internet identifier that can automatically provide the location of the caller to the relay center. A resolution of this problem is not in the foreseeable future.”² Those statements continue to be accurate today. There is not now a direct or even proxy method for reliably determining whether an Internet Relay call is interstate or intrastate in nature.³ Moreover, the Commission has affirmed that Section 225 “does permit [the Commission], for good cause, to sometimes vary from strict jurisdictional separation of costs.”⁴ Based on this assessment, the Commission

² NECA, *Recommended Internet Protocol (IP) Cost Recovery Guidelines*, CC Docket No. 98-67, at 12 (filed Oct. 9, 2002).

³ It is possible that technologies such as geo-location may, at some point in the future, be capable of ascertaining the location of the source of an IP data packet. However, that day has not yet arrived, and until it does, NECA’s statement above continues to remain accurate.

⁴ *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling (continued...)

authorized all Internet Relay calls to be compensated from the Interstate TRS Fund, even though some Internet Relay calls are likely intrastate calls. Good cause existed when the Commission first adopted the *IP Relay Order*, and good cause continues to exist today due to lingering difficulties in separating Internet relay minutes by jurisdiction.

The Commission's decision in the *IP Relay Order* is consistent with other IP-related jurisdictional decisions in other, non-relay proceedings. Indeed, a decision to separate Internet Relay costs along jurisdictional lines would be *inconsistent* with all other Commission decisions to date concerning the Internet and jurisdiction.⁵

Accordingly, Hamilton strongly supports the continued compensation of Internet Relay providers solely from the Interstate TRS Fund. To the extent that future technology may permit jurisdictional separation of Internet Relay calls,

and Second Further Notice of Proposed Rulemaking, CC Docket 98-67, FCC 02-121, 17 FCC Rcd 7779, ¶ 16 (rel. Apr. 22, 2002) (*“IP Relay Order”*).

⁵ See *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, CC Docket No. 80-286, 16 FCC Rcd 11382, FCC 01-162, ¶ 1 (rel. May 21, 2001) (“Since the enactment of the Telecommunications Act of 1996 . . . and the growing presence of new, high-bandwidth technologies and services in the local market, including the Internet, the telecommunications landscape has changed significantly, and lines between interstate and intrastate services are becoming increasingly blurred.”); *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, CC Docket No. 98-79, 13 FCC Rcd 22446, FCC 98-292, ¶ 1 (concluding that DSL service, which provides end-user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level); *id.* ¶ 13 (noting that “Internet traffic involves multiple parties throughout the nation and around the world, rendering traditional jurisdictional measures meaningless” and that “it is not technically possible to segregate and measure Internet traffic based on the geographic location of the parties.”).

Hamilton submits that the issue may be addressed in a Petition for Rulemaking filed by any interested party.

B. The Proxy Methods Proposed in the *FNPRM* Are Unworkable.

The two proxy methods proposed in the *FNPRM* (cost allocation and mandatory customer profiles) have significant shortcomings, many of which have been recognized by the Commission. Both proxy methods suffer from the inability to reliably determine the origination point of the Internet Relay call. A cost allocation proxy will remain inaccurate and arbitrary until technology exists to pinpoint the call, while a mandatory customer profile system would be fatally flawed because of its reliance on user-input information concerning the geographic location of the user, information which may or may not be accurate.

In addition, both methods have their own particular flaws, as described below.

1. Cost Allocation.

The Commission recognized in the *FNPRM* that, to the extent that Internet Relay remains a voluntary service, the Commission lacks the authority to require all states to offer Internet Relay service.⁶ The Commission also recognized that a cost allocation proxy model would be dependent on the cooperation of all intrastate

⁶ *FNPRM* ¶ 223.

jurisdictions in order to work.⁷ Thus, unless and until Internet Relay becomes a mandatory service, a cost allocation proxy model is essentially a non-starter.⁸

Even assuming that the Commission mandates the provision of Internet Relay, many problems remain. First, the Commission lacks any reliable information to determine how interstate and intrastate Internet Relay calls should be apportioned, largely because of the technological shortcomings noted above. While the apportionment of traditional TRS minutes may offer some guidance, the Commission has recognized that Internet Relay minutes now substantially exceed traditional interstate TRS minutes.⁹ Thus, any cost allocation method for Internet Relay based on traditional TRS minutes may produce arbitrary or irrational results.¹⁰

Second, a cost allocation proxy would be inherently anticompetitive and would defeat the goal of offering consumers multiple vendors. This is because each Internet Relay provider would be forced to negotiate contracts with over 50 different intrastate jurisdictions, thus adding numerous costs (to the states, vendors and the

⁷ *Id.* (“[T]he refusal of one or more states to offer IP Relay, or any change in the number of states that offer IP Relay, might render the determination of the proper allocation *among* the states unduly burdensome”) (emphasis in original).

⁸ Hamilton nonetheless remains generally supportive of mandating Internet Relay.

⁹ *FNPRM* ¶ 223 n.646.

¹⁰ In contrast, the Internet Relay compensation rate may continue to be tied to the traditional TRS rate, because the costs associated with providing the services are substantially similar. Thus, the “reasonable costs” for which TRS providers may be compensated are the same for both traditional TRS providers and Internet Relay providers. *See also* Hamilton Petition for Reconsideration (filed Oct. 1, 2004) (proposing a rational, competitively-based rate for traditional TRS and Internet Relay services).

Interstate TRS Administrator) and forcing vendors to comply with various state legal requirements. The administrative costs for complying with a cost allocation system would also discourage the development of improved technology for TRS users, by forcing providers to shift research and development costs to cover administrative costs.

Finally, the cost allocation model should be rejected because it is unnecessary, inefficient, and would frustrate the purpose of the accommodation. It is unnecessary because the Commission is under no statutory obligation to separate all TRS costs along jurisdictional lines. As TDI noted in its comments, Section 225 of the Communications Act requires that Commission regulations “generally” separate interstate and intrastate costs, but not always.¹¹ Where cost separation is impossible, impractical or inefficient, as is the case with Internet Relay, the Commission is not required to force cost separation on providers and users. Indeed, doing so would frustrate the purpose of the statute, which is to accommodate telecommunications users with hearing and speech disabilities and ensure that TRS is available in “the most efficient manner.”¹² For all of these reasons, a cost allocation proxy should be rejected.

2. Mandatory Customer Profiles.

A proxy based on user-defined customer profiles would be flawed for different reasons. First, it is questionable whether such a proxy model would meet the

¹¹ *FNPRM* ¶ 29 (citing TDI comments at 5-6); *see* 47 U.S.C. § 225(d)(3)(B).

¹² 47 U.S.C. § 225(a)(b)(1).

statutory requirement that the service be “functionally equivalent” to voice services,¹³ since voice users are not required to enter such profile information prior to making a voice call. Second, many users and vendors have noted that mandatory profiles raise significant privacy concerns and may deter future use and expansion of Internet Relay. Third, while a customer profile system may at first blush appear to be a quick-fix method of reducing fraudulent Internet Relay calls, a closer examination reveals that any benefits from such a system are illusory. It is simply too easy to register a false location and false information when making an Internet Relay call, and both the Commission and Internet Relay providers lack a reliable method for policing such a system.

Finally, there is no incentive for Internet Relay users to provide a true geographic location or to keep their existing profile current. For example, Internet Relay users may travel and not change their profile, not out of any fraudulent intention, but simply through inertia. If there is no incentive to provide accurate jurisdictional information, many users will simply leave their pre-set profile information unchanged. In short, there is no guarantee that user-input information is or remains accurate, and therefore any jurisdictional cost methodology would suffer fatally from arbitrary information.

¹³ *Id.* § 225(a)(3).

C. The Commission Should Defer Any Decision on Internet Relay Jurisdictional Separation Issues Until IP Issues in General Are Addressed in Other Proceedings.

Hamilton submits that the Commission should defer any decision to change the way it compensates Internet Relay providers until it resolves various IP-enabled service issues generally. The Commission has an ongoing NPRM proceeding to examine those issues,¹⁴ and Hamilton believes that any changes to the way in which Internet Relay is currently regulated would be premature until a decision is reached with respect to jurisdictional separation issues for all IP-enabled services.¹⁵ Fundamental fairness dictates that all IP traffic and all IP providers (including Internet Relay providers) be treated similarly. Moreover, it would waste administrative resources to impose jurisdictional cost separation for Internet Relay if the Commission ultimately decides that all IP traffic, including Internet Relay, is inherently interstate in nature. Therefore, Hamilton urges the Commission to defer any decision on this matter until it can be addressed in the broader context of IP-enabled services generally.

D. The Internet Relay Compensation Rate Should Continue to Be Tied to the Traditional TRS Compensation Rate.

When the Commission first authorized Internet Relay providers to be compensated from the Interstate TRS Fund, it tied the Internet Relay per-minute compensation rate to the per-minute compensation rate for traditional TRS

¹⁴ See *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004) (“*IP-Enabled Services NPRM*”).

¹⁵ See *id.* ¶¶ 38-41.

services. In doing so, the Commission noted the similarities between Internet Relay and traditional TRS.¹⁶ In contrast, the VRS compensation rate has been and continues to be a much higher rate than traditional TRS and Internet Relay, due to the significant expenses involved with VRS, including videoconferencing software costs and skilled labor costs.¹⁷

In the *FNPRM*, however, the Commission appears to express concern that the cost of providing Internet Relay may be less than the cost of providing traditional TRS.¹⁸ Hamilton disagrees that Internet Relay costs are less than traditional TRS costs to such an extent that a separate compensation rate is necessary for Internet Relay. Hamilton's data show that the differential between Internet bandwidth access costs and access costs to the PSTN is decreasing rapidly. Furthermore, there are more call wrap-up and call set-up costs involved with Internet Relay compared to traditional TRS, which leads to higher labor costs on a per-conversation minute basis for Internet Relay. These and other cost differentials are largely offsetting, resulting in relatively minor, if any, differences in costs between traditional TRS and Internet Relay services.

Moreover, Hamilton has proposed an alternative rate structure, the Multi-state Average Rate Structure ("MARS") Plan, which would reduce the compensation

¹⁶ *IP Relay Order* ¶ 22; *see also IP-Enabled Services NPRM* ¶ 174.

¹⁷ *See FNPRM* ¶ 234 (noting the "unique characteristics" of VRS).

¹⁸ *FNPRM* ¶ 233. No source for this suggestion is provided by the Commission, however.

rate for both Internet Relay users and traditional TRS users.¹⁹ As more fully described in Hamilton's Petition for Reconsideration, the MARS Plan is grounded in competition and is thus superior to current rate of return regulation. Hamilton therefore urges the Commission to adopt the MARS Plan and continue to tie the Internet Relay compensation rate to the traditional TRS rate.

II. Video Relay Services.

The issue of establishing a permanent compensation rate for VRS is significantly more difficult. There is no comparable intrastate TRS rate which can be used to establish a VRS rate.²⁰ As an interim measure, the Commission has adopted a rate of return methodology for determining the annual VRS rate. Hamilton does not support the continuation of that methodology, and instead urges the Commission to establish a permanent VRS rate based on a competitively based rate methodology.

Rate of return is an inferior method of regulation. The Commission has repeatedly found that rate of return regulation fails to replicate the competitive market, and instead discourages efficiency and encourages the "padding" of investment. Here is what the Commission said as it began its historic move from rate of return to price cap regulation for major dominant carriers:

In theory, rate of return is intended to replicate competitive market results. However, there are many differences in the manner in which rate of return regulation and competitive forces operate. Competition holds each firm to "normal" profit levels as a result of a

¹⁹ See Hamilton Petition for Reconsideration (filed Oct. 1, 2004).

²⁰ Accordingly, Hamilton's MARS Plan could not be implemented today for VRS.

dynamic process that operates over time — a firm strives to maximize profits and secure advantage over other firms by responding to consumer demand effectively. Under rate of return, however, “normal” profit levels are established in advance by regulatory fiat. The dynamic process that produces socially beneficial results in a competitive environment is strongly suppressed. In fact, rather than encourage socially beneficial behavior by the regulated firm, rate of return actually discourages it.²¹

Thus, where competitive forces exist or can be replicated based on competitively-bid price information, rate of return regulation is disfavored. Hamilton believes that VRS is inherently a competitive service, as evidenced by the number of VRS vendors today. Accordingly, Hamilton believes that the Commission, together with the efforts and support of the VRS industry, can successfully establish a rate methodology grounded in competition. In order to do so, the Commission must establish some mechanism for creating a competitively-bid rate.

For example, the State of California’s approach to traditional TRS prior to the initiation of a national 711 code may be instructive. The California PSC conducted a bidding process which led to an annual rate for traditional TRS, but then encouraged multi-vendoring by authorizing all TRS providers to provide intrastate TRS and be compensated at that rate. While adapting such a methodology for VRS may take time, Hamilton believes that Commission precedent

²¹ *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873, 2889-90 (1989); see also *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, 14 FCC Rcd 12673, 12684 & n.50 (1999).

obligates a detailed examination of competitively-based alternatives to rate of return methodology.

Regardless of the rate methodology chosen, Hamilton urges the Commission to continue to calculate the VRS rate annually. VRS remains a nascent industry, and a biennial process would fail to address the rapid advances in VRS technology, which could lead to lower rates for consumers. Finally, Hamilton believes that the VRS rate adopted each year should be a uniform rate for all VRS providers.

III. Certification and Oversight of Internet Relay and VRS Providers.

The Commission has also requested comments concerning the certification of VRS and Internet Relay providers. Hamilton filed comments in support of a certification process, and recommended that certification be incorporated into the annual reports that VRS and Internet Relay providers must file with the Commission.²² Hamilton continues to believe that a certification system is warranted in order to assure VRS and Internet Relay consumers that their provider is complying with minimum TRS standards.

IV. TRS Advisory Council.

In this proceeding, the Commission is reevaluating the mission of the Interstate TRS Fund Advisory Council (Council), and considering possible changes to its composition.²³ The Council is a non-paid, voluntary advisory committee created by the Commission in 1993. Its mission is to monitor TRS cost recovery

²² Hamilton Comments at 9 (filed Sept. 24, 2003).

²³ *FNPRM* ¶¶ 251-254.

matters²⁴ and to perform other functions as directed by the Commission.²⁵

Hamilton believes that the Council plays an important role in advising the fund administrator on TRS cost recovery issues. That role should be continued.

Hamilton also believes that the composition of the Council is appropriately comprised of members of the hearing and speech disability community; relay users; relay service providers; state regulators and relay administrators; and the carriers that contribute to the Interstate TRS Fund. Hamilton welcomes the Commission's suggestion that non-relay interstate telecommunications consumers be included as members of the Council. Current procedures contain sufficient checks and balances to insure that membership does not become entrenched and that all interests are fairly represented. To the extent that the Commission believes further review of the Council's procedures is necessary, Hamilton submits that the Commission should require the Council to conduct its own internal review of procedures periodically.

V. CA Abuse.

Finally, the Commission requested comment on ways to address the issue of Communications Assistants ("CA") abuse. Hamilton shares the Commission's concerns regarding this issue. In fact, Hamilton has established effective policies and procedures with respect to CA abuse, and would be willing to share those with

²⁴ 47 C.F.R. § 64.604(c)(5)(iii)(H).

²⁵ *FNPRM* ¶ 252.

the Commission upon request, provided that any such filing is given confidential treatment pursuant to the Commission's rules.

Respectfully submitted,

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October 18, 2004

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